Sliman Sales & Service, Inc *and* International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 57-LL-1849. Case 8–CA–32256

May 24, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

Pursuant to a charge filed on March 2, 2001, the Acting General Counsel of the National Labor Relations Board issued a complaint on March 26, 2001, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 8-RC–16098. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, with affirmative defenses, admitting in part and denying in part the allegations in the complaint.

On April 16, 2001, the Acting General Counsel filed a Motion for Summary Judgment. On April 19, 2001, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain but attacks the validity of the certification on the basis its objections to conduct alleged to have affected the results of the election.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.[1] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Ohio corporation, with an office and place of business in Amherst, Ohio, has been engaged in the retail sales and service of automobiles.

Annually the Respondent, in conducting its business operations described above, derived gross revenues in excess of $500,000 and purchases and receives goods valued in excess of $50,000 from points located directly outside the State of Ohio.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held September 22, 2000, the Union was certified on December 20, 2000, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time mechanics and parts employees employed by the Employer at its 7498 Leavitt Road, Amherst, Ohio facility; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.[3]

[1] The Respondent contends, among other things, that the Regional Director's finding in the representation proceeding that employee Thomas Emery was not acting as an agent of the Union when he displayed a prounion sign is erroneous under the standards set forth by the U.S. Court of Appeals for the Sixth Circuit in *Kitchen Fresh, Inc. v.* NLRB, 716 F.2d 351 (6th Cir. 1983). Member Truesdale and Member Liebman adhere to their prior decision in the representation proceeding adopting the Regional Director's finding. However, in agreement with Chairman Hurtgen's partial dissent in that proceeding, they find that even assuming Emery was acting as a limited agent of the Union when he displayed the prounion sign prior to the election, this conduct was not objectionable.

Chairman Hurtgen dissented in part from the overruling of the Respondent's objections in the underlying representation case, and he remains of that view. However, he agrees that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 144, 162 (1941). In light of this, and for institutional reasons, he agrees with the decision to grant the Acting General Counsel's Motion for Summary Judgment.

[2] The Respondent's request that the complaint be dismissed is therefore denied.

[3] The Respondent's answer denies the complaint allegation that the unit is appropriate. We note, however, that the Respondent stipulated that this unit was appropriate in the Stipulated Election Agreement. Although the unit, as certified, contains an exclusion for professional employees that was not specifically listed in the Stipulated Election Agreement, the unit, as described in the certification, is the same unit listed on the notice of election. The Respondent did not file any objection to the election based on this variation between the Stipulated Election Agreement and the notice of election. Nor has it raised the issue in this proceeding in its response to the Order to Show Cause. Moreover, the specific exclusion of professional employees in the unit description here is consistent with the fact that the underlying election petition did not seek professional employees and the election was not conducted

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

On or about January 3 and, thereafter, on February 1 and 19, 2001, the Union, by correspondence, requested the Respondent to recognize and bargain and, since about January 3, 2001, the Respondent has failed and refused. We find that this failure and refusal constitutes an unlawful refusal to recognize and bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing on and after January 3, 2001, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Sliman Sales & Service, Inc., Amherst, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 57-LL-1849 as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time mechanics and parts employees employed by the Employer at its 7498 Leavitt Road, Amherst, Ohio facility; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

(b) Within 14 days after service by the Region, post at its facility in Amherst, Ohio, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 3, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 24, 2001

Peter J. Hurtgen,	Chairman
Wilma B. Liebman,	Member
John C. Truesdale,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

pursuant to the provisions of Sec. 9(b)(1) of the Act. Accordingly, we find that the Respondent's denial of the appropriateness of the unit does not raise any matter that can be appropriately raised in this proceeding.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Association of Machinists and Aerospace Workers, AFL–CIO, District Lodge 57-LL-1849, as the exclusive representative of the employees in the bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time mechanics and parts employees employed by us at our 7498 Leavitt Road, Amherst, Ohio facility; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

SLIMAN SALES & SERVICE, INC.